

**[J-36-2008]**  
**IN THE SUPREME COURT OF PENNSYLVANIA**  
**EASTERN DISTRICT**

**CASTILLE, C.J., SAYLOR, EAKIN, BAER, TODD, McCAFFERY, JJ.**

COMMONWEALTH OF PENNSYLVANIA,	:	No. 49 EAP 2005
	:	
Appellant	:	Appeal from the Order of the Court of
	:	Common Pleas of Philadelphia County
	:	entered October 20, 2005 at CP#8907-
v.	:	4359 1/1
	:	
	:	
THAVIRAK SAM ,	:	ARGUED: October 16, 2006
	:	RESUBMITTED: January 11, 2008
Appellee	:	REARGUED: April 15, 2008

**DISSENTING OPINION**

**MR. JUSTICE BAER**

**DECIDED: July 22, 2008**

I respectfully dissent because there is no proper party to pursue the PCRA petition in this case and, on that basis alone, it should be dismissed. Additionally, under the specific facts of both this case and its companion case, Commonwealth v. Watson, No. 63 EAP 2005, J-37-2008, \_\_\_ A.2d \_\_\_ (Pa. 2008), the governmental interest in carrying out the sentences of death fails to outweigh the violation of Sam's and Watson's liberty interests in not having psychiatric medication forced upon them. Accordingly, I would remand this case, Sam, to the PCRA court for the dismissal of the petition for want of a party-defendant, and, if constrained to decide the issue of involuntary administration of psychotropic drugs, I would affirm the PCRA court's denial of the Commonwealth's attempt to compel the medication of these inmates against their will.

Initially, I note my agreement with the Majority Opinion and Mr. Justice Eakin's Concurring Opinion, which question how an action, including the PCRA petition underlying this case, can be entertained by the courts absent a moving party. Here, it is undisputed that when this PCRA petition was filed, Appellee Sam was - and remains - legally incompetent, and therefore unable to either retain counsel to prosecute the PCRA or to proceed *pro se*. To imply that Sam is a party to this action under these circumstances creates a legal fiction in which I refuse to participate. Thus, as said above, I believe the PCRA court should have dismissed this petition as void for want of a party-defendant, necessitating that PCRA proceedings await Sam's return to competency or the appointment of a next friend.<sup>1</sup> See Thompson v. Peck, 181 A 597, 598 (Pa. 1935) (observing that a case without a party is "completely void and of no effect").

I recognize that dismissing the current PCRA petition presents its own problems. As the Majority points out, the purpose of the PCRA is "to allow for vindication of persons who are actually innocent, or, if not innocent, at least have a colorable claim to a lesser sentence or conviction, or a claim to a new trial." Maj. Slip Op. at 12; see also 42 Pa.C.S. § 9542. Sam would be denied this opportunity. Even if he regained competency, the jurisdictional time-bar of the PCRA, 42 Pa.C.S. § 9545(b), would presumably preclude any claim not cognizable under the timeliness exceptions, substantially reducing Sam's available avenues for PCRA relief.<sup>2</sup> Thus, remanding the case to dismiss the current

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<sup>1</sup> I recognize that a motion seeking to appoint PCRA counsel as next friend was filed on Sam's behalf, and denied by the PCRA court, without prejudice to refile for appointment of a different next friend. While the propriety of the denial is not before this Court, it nevertheless left this matter without a moving party.

<sup>2</sup> Sam potentially could raise a constitutional equal protection or due process argument that as an incompetent defendant he was prevented from either waiving or exercising his PCRA rights, while similarly situated competent defendants were permitted to decide their own strategy. The situation calls for legislative consideration of a limited exception to the PCRA timeliness requirement to accommodate incompetent defendants.

PCRA petition maintains the integrity of the courts by requiring a true party, but it thwarts Sam's rights to PCRA relief.

Moreover, the appointment of a next friend at this point also presents problems because it cannot undo the fact that the petition now before us was filed pressed against the applicable jurisdictional time-bar. See Maj. Slip. Op. at 2 n.3 (citing 42 Pa.C.S. § 9545(b), and observing that any petition relating to a conviction that became final prior to the 1995 amendments must have been filed prior to January 17, 1997). All but the limited arguments cognizable under the timeliness exceptions will be lost. Further, if Sam regained competency, he would be presumably entitled to begin a new round of PCRA proceedings prolonging this case even further. Commonwealth v. Haag, 809 A.2d 271, 304 n.11 (Pa. 2002).

Although I would remand to dismiss the petition despite the complications discussed, I nonetheless must speak to the Majority's holding because, while it acknowledges the problems inherent in the lack of a party-defendant, it leaves resolution of those problems for the trial court's consideration after forced medication of the defendant.<sup>3</sup> Thus, I address this Court's decision to permit the involuntary injection of Sam in an attempt to return him to competence, so he can choose whether and how to litigate his PCRA claims. The Majority's discussion and this dissent necessarily begin with an analysis of Sell v. United States, 539 U.S. 166 (2003). Accordingly, I begin with a brief recitation of the facts in Sell. Dr. Sell was a dentist who developed a serious mental illness. Id. at 169. He was chronically in and out of mental health hospitals, and treated with antipsychotic drugs. He was eventually charged with attempting to murder an FBI agent, who had arrested him for insurance fraud, and a former employee, who was a witness in the fraud case. Before trial,

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<sup>3</sup> Likewise, the concurrence joins the Majority based on the Commonwealth's failure to raise the issue of the void petition.

it was determined that Sell was legally incompetent, but not dangerous to himself or others. Id. at 184-85. Against this backdrop, the United States Supreme Court agreed to decide whether the government could involuntarily medicate Dr. Sell in an attempt to render him competent to stand trial. Id. at 169.

The Court constructed a framework for the consideration of when a government could compel the involuntary medication of an inmate, outside of the previously approved situations involving danger to the inmate or others, see Washington v. Harper, 494 U.S. 210 (1990). The High Court acknowledged and reiterated that it had “recognized that an individual has a significant constitutionally protected liberty interest in avoiding the unwanted administration of antipsychotic drugs.” Sell, 539 U.S. at 178 (internal quotation marks omitted). The Court further opined that an inmate’s liberty interest could only be overcome by an “essential” or “overriding” state interest. Id. at 178-79. Amalgamating the holdings in its prior cases, the Court devised a four-part test for determining when compelled medication would be constitutional:

[T]he Constitution permits the Government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests.

Id. at 179. As I find the government’s case fails for lack of a sufficiently important governmental interest, I confine my discussion to that element.

Immediately after the above quoted passage in Sell, the Court opined that this standard “will permit involuntary administration of drugs solely for trial competence purposes in certain instances. But those instances may be rare.” Id. at 180. It continued, “First, a court must find that *important* governmental interests are at stake.” Id. (emphasis in original). While the Court noted that bringing one accused of a serious crime to trial is

important; significantly, it tempered this comment, explaining that the importance was because “the Government seeks to protect through the application of criminal law the basic human need for security.” Id. The High Court then immediately recognized that special circumstances, including already imposed lengthy confinement in a mental institution, would lessen the importance of the government’s interests in involuntarily medicating an individual to permit him to go to trial. Id. Although not acknowledged by the Majority in this case, notwithstanding that Dr. Sell was awaiting trial for attempted murder, the High Court observed,

[T]he lower courts did not consider that Sell has already been confined at the Medical Center for a long period of time, and that his refusal to take antipsychotic drugs might result in further lengthy confinement. Those factors, the first because a defendant ordinarily receives credit toward a sentence for time served, and the second because it reduces the likelihood of the defendant’s committing future crimes, moderate - though they do not eliminate - the importance of the governmental interest in prosecution.

Id. at 186 (internal citations omitted). Accordingly, the Supreme Court held that the government failed to demonstrate a basis for involuntary medication sufficient to override Sell’s liberty interest based on the record before the Court. The Court, therefore, vacated the lower court’s order authorizing the forced administration of antipsychotic medication. Id.<sup>4</sup> The case before us presents much stronger facts against involuntarily medicating Sam, than those found lacking by the Supreme Court in Sell. In both cases, the defendants

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<sup>4</sup> I acknowledge the Majority Opinion’s observation that the Court remanded the Sell case to allow the government to develop evidence to support forced medication based on the factors discussed. Recognition of that action, however, does not detract from the fact that the asserted governmental interest in this case still pales in comparison to the interest present before the Court in Sell, which was not sufficient, absent further information, to support the order of forced medication.

were and are not a danger to themselves or others.<sup>5</sup> In Sell, the government risked the potential that, if it could not medicate Sell, it would be unable to convict him of attempted murder because the evidence against him could become stale prior to his regaining competency to stand trial. Even though Sell could potentially escape trial, the Court concluded that his long-term confinement in a mental institution tempered the government's interest in conviction by reducing any likelihood that he would be able to commit future crimes.

The government's interest in protecting the public in Sam is drastically less important than it was in Sell, as Sam has been tried, convicted, and sentenced for the crimes at issue, and will remain incarcerated for the balance of his life, without the possibility of parole. Moreover, as the government has already met all of its burdens of proof for conviction and sentencing; the risk of the loss of evidence falls squarely on Sam, who has the burden of demonstrating his right to relief under the PCRA. Additionally, I reject the Majority's argument that the Commonwealth has demonstrated a two-fold "important" government interest in compelling medication: first, in order to secure society's interest in the finality of the judgment of sentence, which has been delayed for over fifteen years, and second, to provide Sam the ability to exercise his rights under the PCRA. I find neither of these interests sufficiently important to impinge upon the vital liberty interest at stake. In fact, I find that both of these justifications are merely an attempt to obfuscate the real "finality" that is before us -- the Commonwealth's desire to put Sam to death. Compelling medication so that Sam can pursue collateral relief, because it is ostensibly in his best interest, belittles the significant liberty interest that is at stake in this case. Clearly, Sam

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<sup>5</sup> I reject the suggestion that Sam is a danger to himself or others due to his refusal to submit to routine physical examinations, because of the potential of communicable diseases. See Maj. Slip Op. at 8, n.10. Failure to take a physical examination was not the danger to self or others or the grave health risk suggested by Harper, as referenced in Sell. A hypothetical danger cannot justify the concrete liberty invasion at issue in this case.

has as much of an interest in avoiding an unwanted and forced drugging as he has in pursuing collateral relief. While, as posited by the Majority, there is certainly a governmental interest in carrying out the sentence this interest simply cannot be sufficient to trump the important liberty interest in avoiding forced medication, considering that the governmental interest in bringing Sell to trial was insufficient to overcome his liberty interests based on the record in Sell. Put differently, if the need to try Sell was insufficient to overcome his constitutional right to his bodily integrity, the need to execute Sam is also insufficient.

As I reject the Majority's attempt to frame this case as satisfying the Sell test for involuntary medication of an inmate, I dissent from the Majority's attempt to read Sell as creating a gaping opening for governmental intrusion on the individual's liberty interest through the so-called Sell "caveat." Rather than providing a separate exception to the Sell test, the "caveat," merely states the long-standing rule allowing for forced medication when an inmate is a danger to himself or others. Id. at 182 (acknowledging that that the four-part standard does not apply to cases where medication is "warranted for a different purpose, such as the purposes set out in Harper related to the individual's dangerousness, or purposes related to the individual's own interests where refusal to take drugs puts his health gravely at risk" (emphasis in original)).

The High Court observed that the four-part test is unnecessary in such cases involving dangerousness or a grave risk to the inmate's health, because the standards for compelling medication in such situations were already well established.

For one thing, the inquiry into whether medication is permissible, say, to render an individual nondangerous is usually more "objective and manageable" than the inquiry into whether medication is permissible to render a defendant competent. The medical experts may find it easier to provide an informed opinion about whether, given the risk of side effects, particular drugs are medically appropriate and necessary to control a patient's potentially dangerous behavior (or to avoid serious harm to the

patient himself) than to try to balance harms and benefits related to the more quintessentially legal questions of trial fairness and competence.

Id. (internal citation omitted). The Majority in Sell noted that courts are familiar with and have procedures for involuntary commitment and administration of medication.

Despite the Majority's assertions, forced medication under this "caveat," however, is not appropriate for any purpose "related to the individual's own interest," such as Sam's interest in pursuing PCRA relief, as suggested by the Majority. Rather, the Sell caveat was intended to overcome the constitutional right to the integrity on one's body only when the "refusal to take drugs puts his health [or the health of others] gravely at risk." Id. at 182. The benefit to the defendant contemplated in Sell is not the attenuated potential interest in being cleared of wrongdoing through the PCRA, but instead is a very concrete interest in protecting an individual and others around him from a grave risk to health. I, thus, cannot join the judicial sleight of hand of equating Sam's pursuit of collateral relief with the grave health risk exception created by the Court when the two are qualitatively distinct. The substantial liberty interest in this case compels that any exception to applying the Sell test must be confined to the exceptions set forth by the United States Supreme Court, i.e., the Commonwealth must demonstrate that Sam is a danger to himself or others or that there is a grave health risk at stake. Accordingly, I dissent from the Majority's conclusion that the governmental interest in finality or potential vindication through the PCRA overrides the inmate's interest in avoiding forced medication.

For all of the reasons expressed herein, I would remand this case with directions that the PCRA court dismiss the current petition. This would permit all counsel to assess and act on their options, but with the understanding that the forced medication of Sam under these facts is constitutionally impermissible.

Madame Justice Todd joins this dissenting opinion.